

1284 STALKING — § 940.32(2)**Statutory Definition of the Crime**

Stalking, as defined in § 940.32(2) of the Criminal Code of Wisconsin, is committed by one who intentionally engages in a course of conduct directed at a specific person that causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))] and that would cause a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))] and where the actor knows or should know that the conduct will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].¹

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally engaged in a course of conduct directed at (name of person).

“Intentionally” requires that the defendant acted with the purpose² to engage in a course of conduct directed at (name of person).

“Course of conduct” means a series of two or more acts carried out over time,

however short or long, that show a continuity of purpose.³ Acts that you may find constitute a course of conduct are limited to: (identify acts listed in § 940.32(1)(a)1. 10 that are supported by the evidence.).⁴

2. The course of conduct would have caused a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].

[“Suffer serious emotional distress” means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental health professional.]⁵

[“Member of a family” means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.]⁶

[“Member of a household” means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).]⁷

To determine whether this element is established, the standard is what effect the course of conduct would have had on a person of ordinary intelligence and prudence in the position of (name of person) under the circumstances that existed at the time of the course of conduct.

3. The defendant's acts⁸ [caused (name of person) to suffer serious emotional distress] [induced fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].

4. The defendant knew or should have known that at least one of the acts constituting the course of conduct would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].⁹

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1284 was originally published in 1994 and revised in 1999, 2003, 2004, 2010, 2011, and 2013. The 2013 revision added reference to State v. Hemmingway to the comment. This revision was approved by the Committee in June 2021; it revised footnote 4 to reflect changes made by 2021 Wisconsin Act 28.

2003 Wisconsin Act 222 [effective date: April 27, 2004] amended § 940.32(2) to add causing a person to “suffer serious emotional distress” and changing the mental state requirement addressed in the fourth element from “intends” to “knows or should know.”

Section 940.32 was created by 1993 Wisconsin Act 96 [effective date: December 25, 1993]. As originally enacted, it was adapted from a model “anti-stalking code for the states” prepared by the National Institute of Justice (NIJ) and the National Criminal Justice Association. The model and its development are described in an NIJ Research Report, “Project To Develop a Model Anti-Stalking Code for the States,” October 1993 (NCJ 144477).

Section 940.32 was extensively amended by 2001 Wisconsin Act 109, [effective date: July 30, 2002]. The revised statute defines two offenses: violations of sub. (2) are addressed by this instruction; violations of sub. (2e) are addressed by Wis JI Criminal 1284B. Subsections (2m) and (3) provide for an increase in the penalty if specified facts accompany a violation of sub. (2). See Wis JI Criminal 1284A.

The constitutionality of § 940.32 as originally enacted was upheld in State v. Ruesch, 214 Wis.2d 548, 571 N.W.2d 898 (Ct. App. 1997), the first published decision dealing with the stalking statute. Claims based on overbreadth, vagueness, and equal protection were all rejected.

The defendant in Ruesch also claimed that sub. (4) of § 940.32, which states that “[t]his section does not apply to conduct that is or acts that are protected by the person’s right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions . . .,” creates an element of the crime. The court disagreed, holding that “[b]ecause subsection (4) provides no elements of the crime of stalking, it plays no role in the State’s burden of proof at trial.” 214 Wis.2d 547, 555.

In State v. Hemmingway, 2012 WI App 133, 345 Wis.2d 297, 825 N.W.2d 303, the court of appeals addressed how freedom of speech relates to stalking charges. The court reversed a trial court order that had dismissed a stalking charge on the ground that the statute was overbroad. The court of appeals held: “The First Amendment does not protect intentional conduct designed to cause serious emotional distress or fear of bodily harm or death in a targeted victim.” ¶1.

Section 947.013 defines similar offenses by penalizing violations of harassment restraining orders. See Wis JI Criminal 1910, 1911, and 1912.

1. The statement of the offense in the first paragraph of the instruction is a paraphrase of the statute, which begins: “whoever meets all the following criteria . . .” Those criteria are redundant and overlapping. In the Committee’s judgment, the statute requires:

- (a) a course of conduct directed at a specific person;
- (b) the course of conduct would cause serious emotional distress or fear of bodily injury or death in a reasonable person;
- (c) the acts caused serious emotional distress or fear of bodily injury or death in a specific person; and
- (d) the defendant knew or should have known that at least one of the acts would cause that person to suffer serious emotional distress or place that person in reasonable fear.

2. “Intentionally” requires either mental purpose to cause the result specified or awareness that one’s conduct is practically certain to cause the result. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI Criminal 923A and 923B for elaboration on the two alternatives.

3. The definition of “course of conduct” is the one provided in § 940.32(1)(a). 2001 Wisconsin Act 109 revised the definition to provide a list of different types of actions that the course of conduct “may include.” Before the revision, “course of conduct” was defined as “maintaining a visual or physical proximity,” an alternative that is retained in § 940.32(1)(a)1. For a case reviewing the sufficiency of the evidence on this factor, see State v. Sveum, 220 Wis.2d 396, 584 N.W.2d 137 (Ct. App. 1998).

4. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 9. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: “. . . including any of the following: . . .” The Committee concluded that this means that

acts constituting the course of conduct are limited to the types listed. Subdivision 10. of § 940.32(1)(a) extends the coverage of the statute to “causing a person to engage in any of the acts described in subds. 1. to 9.”

2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

2021 Wisconsin Act 28 [effective date: April 25, 2021] amended subds. 6., 7., and 7m. It confirmed that electronic stalking is a violation of the statute. Specifically:

(1)(a)6. Contacting the victim by telephone, text message, electronic message, electronic mail, or other means of electronic communication or causing the victim’s telephone or electronic device or any other person’s telephone or electronic device to ring or generate notifications repeatedly or continuously, regardless of whether a conversation ensues.

(1)(a)7. Sending to the victim any physical or electronic material or contacting the victim by any means, including any message, comment, or other content posted on any Internet site or web application.

(1)(a)7m. Sending to a member of the victim’s family or household, or any current or former employer of the victim, or any current or former coworker of the victim, or any friend of the victim any physical or electronic material or contacting such person by any means, including any message, comment, or other content posted on any Internet site or web application for the purpose of obtaining information about, disseminating information about, or communicating with the victim.

In 2010, the Committee reviewed its conclusion that acts constituting the course of conduct were limited to the types listed. Usually, when a statute introduces a list with “including,” that indicates that the list is non-exhaustive. But in this statute the meaning appeared to be ambiguous, especially in light of the overall introduction to the crime definition which begins “whoever meets all of the following criteria.” The Committee reviewed the legislative history and found that it did not resolve the ambiguity; while it showed an intent to broaden the coverage of the statute it also showed that some options were considered and not included. Further, two sections of the statute clearly appear to be limited to acts enumerated in the list. Subdivision 10. of § 940.32(1)(a) extends liability to “causing a person to engage in any of the acts described in subds. 1. to 9.” Subsection (2e) is also limited to one who “engages in any of the acts listed in sub. (1)(a)1. to 10.” The review convinced the Committee to reaffirm the original conclusion.

5. The definition of “suffer serious emotional distress” is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 222, which reads as follows:

(3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. This element is based on § 940.32(2)(c) and thus refers to the defendant's "acts" rather than to "course of conduct," the phrase used in the other elements. Because the legislature used different terms in the different subsections, they are assumed to have different meanings. "[T]he evidence is sufficient to support a stalking conviction if the victim's knowledge of one of the actor's acts induces fear in the victim." State v. Sveum, 220 Wis.2d 396, 413 414, 584 N.W.2d 137 (Ct. App. 1998).

9. 2003 Wisconsin Act 222 amended § 940.32(2)(b) to require that the actor "knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ." This restores § 940.32 to the way it read when originally enacted; it required that the defendant "knew or should have known . . ." 2001 Wisconsin Act 109 had amended § 940.32(2)(b) to substitute "intends."